No. 21850

In the

United States Court of Appeals

For the Ninth Circuit

ALFRED ROMERO and GLORIA J. ROMERO,
Appellants,

vs.

TEN EYCK-SHAW, INC., XYZ CORPORATIONS K through X and JOHN DOE I through X,
Appellees.

Opening Brief of Appellee Ten Eyck-Shaw, Inc.

MORSE & GRAVES
116 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Appellee

SORG PRINTING COMPANY OF CALIFORNIA, 345 FIRST STREET, SAN FRANCISCO 94105

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JURISDICTIONAL BASIS

Jurisdiction is based on allegations of Appellants' Complaint and 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellee objects to the Appellants' Statement of the Case in that it omits certain pertinent facts essential to a full and accurate statement and, therefore, presents this additional statement.

Ten Eyck-Shaw, Inc., a Texas corporation, entered into a contract for the construction of a bank and garage building in Las Vegas, Clark County, Nevada, in June, 1964 (R. 40, 41, 42, 43, 44, 46 and 47). Ten Eyck-Shaw, Inc., as principal contractor, employed Guy Apple Masonry Contractors, Inc., an Arizona corporation, as subcontractor to perform certain construction work on said construction contract in Las Vegas, Clark County, Nevada (R. 49, 50 and 51). Guy Apple Masonry Contractors, Inc., subcontractor, hired Alfred Romero to perform certain work on said construction contract in Las Vegas, Clark County, Nevada (R. 53 and 54). Alfred Romero had previously worked on a construction project for Guy Apple Masonry Contractors, Inc. in Arizona, and states in his affidavit that he was hired in Arizona (R. 85), but Guy Apple, President of Guy Apple Masonry Contractors, Inc., states in his affidavit that Alfred Romero came to Las Vegas, Nevada at his own expense seeking employment on the Las Vegas construction and was hired in Las Vegas. All of the work on the construction project under Ten Eyck-Shaw, Inc., principal contractor, was performed in Las Vegas, Clark County, Nevada, and Alfred Romero was employed in Las Vegas, Clark County, Nevada from June, 1964 through September 30, 1965 (R. 53-54).

Ten Eyck-Shaw, Inc., as principal contractor, and Guy Apple Masonry Contractors, Inc., as subcontractor, elected to accept and did come within the provisions of the Nevada Industrial Insurance Act, NRS 616 (R. 35, 36, 38, 52 and 54). Neither Guy Apple Masonry Contractors, Inc. nor Alfred Romero ever filed with the Commission any rejection of the Nevada Industrial Insurance Act. Alfred Romero filed a claim with the Nevada Industrial Commission for injuries both on June 27, 1965 and on March 24, 1965, and elected to and did take the sum of $6,184.67 as medical benefits and compensation which the Nevada Industrial Commission found was due him by reason of the fact that his injuries arose out of and in the performance of his employment in Las Vegas, Nevada (R. 36). Appellants admit Nevada statutes prohibit this action by a subcontractor's employee against the principal contractor (Opening Brief, p. 3).

QUESTION PRESENTED

Whether the record supports the Summary Judgment for the principal contractor and statutory employer when the Nevada statute bars a personal injury action against the principal contractor by a subcontractor's employee who accepted and received medical benefits and compensation under the Nevada Industrial Insurance Act?

ARGUMENT ON THE QUESTION

The District Court Properly Held That the Defendant-Appellee is Entitled to Summary Judgment as a Matter of Law (R. 88) and Concluded:

> "This Court believes that the Nevada statute governs here and that this would be true whether this action was commenced against the Defendant in Arizona or Nevada, in the State or Federal Courts. The Arizona Workmen's Compensation Act has no application to

this action. *Williamson v. Weyerhaeuser Timber Company,* 9 Cir., 1955, 221 F.2d 5; *Home Indemnity Company of New York v. Poladian,* 4 Cir., 1959, 270 F.2d 156; *Simon Service Incorporated v. Mitchell,* 73 Nev. 9, 307 P.2d 110 (1957); *Titanium Metals Corp. of Amer. v. Eighth Judicial Dist. Ct.,* 76 Nev. 72, 75, 349 P.2d 444 (1960)." (R. 93).

A. Introduction.

Appellants admit this action is barred by Nevada law, but they say, in effect, "Disregard Nevada law, because I'm from Arizona where I was covered by the Arizona Workmen's Compensation Act in 1964 when I worked in Arizona for the subcontractor. I think the subcontractor hired me in Arizona to go to Las Vegas, Nevada and work on the bank construction job in Las Vegas, so Arizona law gives me the right to sue the principal contractor for injuries in 1965 which occurred in Las Vegas, Nevada even though I elected to and did receive medical benefits and compensation from the Nevada Industrial Commission. I can reap all the benefits of the Nevada Industrial Insurance Act, and because I am from Arizona, I can disregard the Nevada statutory prohibition against suing the principal contractor, ignore his statutory defense and any protection Nevada gives him."

Appellants' contention would lead to all of the consequences which Nevada's workmen's compensation laws were designed to avoid. Application of Appellants' novel proposition would cause an undue burden on the principal contractor on a construction job employing five hundred employees. The principal contractor would have to investigate the hiring of each employee on the job, question the former residence and any subcontractor relationship of each employee, and examine the laws of the other forty-nine

states to whose vagaries he might become subject. Under the Appellants' proposal of subserviency from the state of the injury, Nevada would be powerless to provide any protection to the principal contractor within its borders by fixing a liability which is limited and determinate.

B. Arizona Workmen's Compensation Act Has No Application Against an Employer in Nevada for an Injury Which Occurred in the Course of Employment in Nevada.

This Court, in *Williamson v. Weyerhaeuser Timber Company* (1955) 221 F.2d 5, held that if an employee employed by an Oregon corporation and killed in Washington by a Timber Company's truck while inspecting tractors sold by the employer to Timber Company, was covered by Washington Workmen's Compensation Act, widows' wrongful death action brought in Federal Court in Oregon against Timber Company would be barred under Washington Workmen's Compensation Act even though Workmen's Compansation Act allows employees who are injured through negligence of a third party to elect whether to take under the Workmen's Compensation Act or recover damages from the third person.

This Court, at pp. 11, 12, said:

> "Manifestly if the law of Washington says no cause of action arose, no Oregon court could by application of any rule of the State of Oregon make the conduct here complained of actionable. As stated by Mr. Justice Holmes in American Banana Company v. United Fruit Company, 213 U.S. 347, 356, 29 S.Ct. 511, 513, 53 L. Ed. 826, 'But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an intereference with the authority of another sovereign, contrary to the comity of nations,

> which the other state concerned justly might resent.' * * * The basic question before the trial court was whether an actionable tort had been committed in the State of Washington. As stated by Mr. Beale, 'If by the law of the place where the defendant caused an event to happen this event created no right of action in tort, no action can be brought on account of the event in another state although it would create a cause of action by the law of that other state: whether by the common law or by a statute.' 2 Beal, Conflict of Laws, § 378.4" This Court succinctly summarized, at p. 12:
>
> "No interest which Oregon had in Williamson as its citizen would permit that state to arm him with a body of Oregon law which he could carry about as he went into the State of Washington. Much less could it impose upon the timber company, as it carried on its Washington operations, some rule of liability evolved from Oregon legislative policy. Wholly apart from the power of Oregon to project a rule of civil liability of its own making into the State of Washington, it is plain that it has not undertaken to do so."

In the Fourth Circuit, in *Home Indemnity Company of New York v. Poladian* (1959), 270 F.2d 156, the Court held that where an injured employee, a District of Columbia resident, worked for direct employer who was also a District of Columbia resident on a job in Virginia for contractor, a Virginia resident, and employee was injured on such job and elected to recover compensation in District of Columbia which did not bar common-law actions for negligence, law of Virginia barring common-law actions of negligence to injured workman and providing for workmen's compensation in lieu thereof was controlling in direct employer's insurance carrier's action against insurance carrier for Virginia contractor to recover com-

pensation paid and payable to injured employee. The Court stated, at p. 158:

> "The well established general rule is that in an action for negligence the law of the locality where the negligence occurred controls. Ordinarily, in determining whether an actionable tort has been committed in Virginia we look to its laws, for it is within Virginia's competence to take away the common-law right of action if it deems it more just to award fixed compensation irrespective of negligence. In three Federal Circuits this rule has been applied in bar of common law actions in situations similar to this. Jonathan Woodner Co. v. Mather, 1954, 93 U.S. App. D.C. 234, 210 F.2d 868, certiorari denied 1954, 348 U.S. 824, 75 S.Ct. 39, 99 L.Ed. 650; Williamson v. Weyerhaeuser Timber Co., 9 Cir., 1955, 221 F.2d 5; Bagnel v. Springfield Sand & Tile Co., 1 Cir., 1944, 144 F.2d 65 Certiorari denied 1944, 323 U.S. 735, 65 S.Ct. 72, 89 L.Ed. 589.
>
> Directly in point is Restatement, Conflict of Laws, § 401 (1948 Supp.) which declares:
>
> 'If a cause of action in tort or an action for wrongful death either against the employer or against a third person has been abolished by a Workmen's Compensation Act of the place of wrong, no action can be maintained for such tort or wrongful death in any State.'"

The Court continued at p. 159:

> "Applying the principle of the federal cases, as we have seen, the plaintiff cannot prevail here because the state where the injury occurred, Virginia, has abolished the common-law remedy against one who is subject to its Workmen's Compensation Law and has complied with its insurance provisions. If, on the other hand, we were to adopt the employment relationship concept of the Wilson case, the factual context here presented still requires us to enforce Virginia law.

For in the instanc case the general contractor does not reside or do business in the District of Columbia, and has no direct connection with that jurisdiction. If a state's contact with the various aspects of the employment relationship is to control the choice of law, then even under Wilson it would hardly be permissible to subject the general contractor to the law of a jurisdiction with which he is in no way connected, simply because the subcontractor and the plaintiff-employee have contacts there.

No reason occurs to us for saying that when action against a general contractor by a subcontractor's injured employee is barred by the law of the state where the injury occurred, the employee may at his option remove the bar by accepting an award of compensation from the subcontractor in another state. The relationship between the workman and his immediate employer may in respect to rights inter sese be governed by the state where they reside and where compensation has been provided and paid, but the general contractor, residing and operating in another state, is ordinarily governed by the laws of that state. He remains subject to the obligations of these laws and is entitled to the benefits that accrue to him from compliance.

Nor can the fact that the employee has chosen not to avail himself of the remedy provided by the Virginia statute lessen the protection it affords the general contractor. The applicability of the Act is determined when the employee enters upon the work in Virginia and the general contractor, as statutory employer, complies with the Act's requirements. Sykes v. Stone & Webster Engineering Corp., 1947, 186 Va. 116, 41 S.E.2d 469; Doane v. E. I. DuPont de Nemours & Co., 4 Cir. 1954, 209 F.2d 921. This cannot be changed by the actions of the employee or employer after the accident."

This Court, in *Williamson v. Weyerhaeuser Timber Company,* supra, 221 F.2d at 11, 12, 13 and 14, considered the

applicability of all the cases discussed in Appellants' Opening Brief, except *Crider v. Zurich Ins. Co.* (1965), 380 U.S. 39, 85 S.Ct. 769 (App. Op. Br. p. 8, 9), *Hughes v. Fetler* (1951), 341 U.S. 609, 71 S.Ct. 980, 257 Wis. 35, 42 N.W.2d 452 (App. Op. Br. p. 6, 9), and *Miller v. Yellow Cab Co.* (1941), 308 Ill. App. 217, 31 N.E.2d 406 (App. Op. Br. 13).

Crider v. Zurich Ins. Co., supra, was concerned with whether Georgia's provisions for primary jurisdiction in an administrative board precluded original court jurisdiction. Appellants rely heavily upon *Hughes v. Fetler,* supra, which involved a wrongful death action by a citizen of Wisconsin against another citizen of Wisconsin and an insurance company incorporated in Wisconsin for the death of a Wisconsin citizen in an Illinois automobile accident. Wisconsin did have a wrongful death act for a death caused in the State of Wisconsin, and the Court held Wisconsin should also entertain an action for wrongful death in another state. *Miller v. Yellow Cab Co.,* supra, allowed the prosecution of an action by an employee, hired, residing, employed in Texas, temporarily in Chicago, where he was injured while riding in a Yellow Cab on Texas company business, to sue Yellow Cab Co. as a third party tort-feasor. The rationale of the cases cited by Appellants are clearly distinguishable from the issues raised here.

C. The Nevada Law Bars an Action for Personal Injury by an Employee of a Subcontractor Against the Principal Contractor when the Principal Contractor and Subcontractor Elected to and Did Come Within the Provisions of the Nevada Industrial Insurance Act, NRS 616 and the Employee Elected to and Did Receive Benefits Under the Nevada Industrial Insurance Act.

The Nevada Industrial Insurance Act provides:

> *NRS 616.085 "Employee and workman": Subcontractors and employees.* Subcontractors and their employees shall be deemed to be employees of the principal contractor.

NRS 616.090 "Employer" defined. "Employer" shall be construed to mean.

1. The state, and each county, city, school district, and all public and quasi-public corporations therein.

2. Every person, firm, voluntary association, and private corporation, including any public service corporation, which has any natural person in service.

3. The legal representative of any deceased employer.

NRS 616.105 "Independent contractor" defined. "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished.

NRS 616.115 "Subcontractors" defined. "Subcontractors" shall include independent contractors.

NRS 616.260 Exemption of Employer and workman temporarily within state.

1. Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this chapter while such employee is temporarily within this state doing work for his employer if such employer has furnished industrial insurance coverage under the industrial insurance act or similar laws of a state other than Nevada so as to cover such employee's employment while in this state, provided:

(a) The extraterritorial provisions of this chapter are recognized in such other state; and

(b) Employers and employees who are covered in this state are likewise exempted from the application of the industrial insurance act or similar laws of such other state.

The benefits under the industrial insurance act or similar laws of such other state shall be the exclusive remedy against such employer for any injuries, whether resulting in death or not, received

by such employeee while working for such employer in this state.

2. A certificate from the duly authorized officer of the industrial commission or similar department of another state certifying that the employer of such other state is insured therein and has provided extra-territorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carried such industrial insurance.

NRS 616.270 Employers to provide compensation; relief from liability.

1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter, and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

2. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided.

NRS 616.370 Rights and remedies conclusive and obligatory on employers and employees.

1. The rights and remedies provided in this chapter for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury.

2. The terms, conditions and provisions of this chapter for the payment of compensation and the amount thereof for injuries sustained or death resulting from such injuries shall be conclusive, compulsory and obligatory upon both employers and em-

ployees coming within the provisions of this chapter. The Court below pointed out that:

"If, as plaintiff contends, the masonry subcontractor had complied with and was in good standing under the Arizona Act and had brought some twenty employees, including plaintiff, to Nevada for the bank job, the masonry subcontractor could have become exempt from the Nevada Act under NRS 616.260 (R.91)." The Court further noted that the masonry subcontractor did not seek such exemption but, on the contrary, fully complied with the Nevada Industrial Act, as had the defendant, the general contractor (R.92).

Regardless of whether or not the subcontractor hired the employee in Arizona or Nevada, the provisions of the Arizona Workmen's Compensation Act cannot give the employee a cause of action in Nevada against the principal contractor and statutory employer in Nevada, for an injury which occurred in the course of employment in Nevada, which cause of action the State of Nevada has abolished by the enactment of Nevada Revised Statutes Chapter 616.

The decisions of the Nevada Supreme Court specifically hold that an employee of a subcontractor has no common law action for injuries sustained in the course of his employment against the principal contractor.

In *Simon Service Incorporated v. Mitchell,* 73 Nev. 9, 307 P.2d 110, defendant in constructing a building, entered into various separate contracts, and the Court held that the fact that defendant was the "general contractor" or "principal employer" would preclude one contractor's employee, who suffered injuries in the course of his employment and accepted benefits of the Industrial Insurance Act, from recovering at common law from defendant for the injuries sustained.

The Court stated in *Titanium Metals v. District Court,* 76 Nev. 72, 75, 349 P.2d 444: "We conclude that the said con-

tract and affidavit bring this case squarely under the ruling in *Simon Service v. Mitchell,* 73 Nev. 9, 307 P.2d 110. There this Court held that where a defendant owner, in constructing a building, entered into separate contracts, the fact that defendant was a general contractor or principal employer would preclude an employee of another contractor who suffered injuries in the course of his employment and accepted benefits under the Industrial Insurance Act from recovering at common law from defendant for the injuries sustained."

Subsequent Nevada District Court decisions are clear that an employee of a subcontractor has no course of action against the principal contractor.

In *Carmie R. Jacobson v. Ten Eyck-Shaw, Inc., a Texas corporation qualified to do business in Nevada,* Case No. A 23660, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, the undersigned brought a Motion for Summary Judgment in February, 1967 on behalf of Ten Eyck-Shaw, Inc. against the plaintiff employee of a subcontractor, Las Vegas Machine, Inc., on the grounds that Ten Eyck-Shaw, Inc. was the principal contractor and employer who had complied with the provisions of the Nevada Industrial Insurance Act and that the plaintiff employee elected to and did receive the benefits of the provisions of the Nevada Industrial Insurance Act, and had no right to institute legal action against the defendant. The Court granted the Motion for Summary Judgment on the 24th day of February, 1967 and no appeal has been taken therefrom.

An Order Granting Motion for Summary Judgment was entered January 20, 1967 against the plaintiff employee in *Robert Osborn and Queenie Mae Osborn, Husband and Wife, v. Southwest Gas Corporation, a California corpora-*

tion, Elda J. Pruitt and Willie Kennedy, Case No. A 23732, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. Therein the employee of a subcontractor, and his wife, sued the principal contractor and two of the principal contractor's employees. No appeal has been taken therefrom. In *James E. Walsh v. McDonald Engineering Co. of California,* Case No. A 10557, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, the plaintiff was an employee of one of the subcontractors and brought an action for injuries against another subcontractor for the injuries sustained. Summary Judgment against the plaintiff was granted, January 7, 1966, and no appeal has been taken therefrom.

CONCLUSION

The principal contractor is an employer within the provisions of the Nevada Industrial Insurance Act, and Appellant was an employee working in the scope of his employment at the time of his injury. Employee's sole and exclusive remedy under the laws of the State of the employment and injury, Nevada, is under the provisions of the Nevada Industrial Insurance Act, under which provisions employee elected to and did receive benefits. Appellants have no common law action against the principal contractor and employer, the provisions of the Nevada Industrial Insurance Act being exclusive of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury. The Arizona Workmen's Compensation Act creates no new cause of action in Nevada for an employee whose statutory employer complied with the provisions of the Nevada Industrial Insurance Act and is entitled to its protection, the statutory employer and principal

contractor never having been under the legislative control of the State of Arizona.

For the reasons stated here, it is respectfully submitted that the District Court's Summary Judgment be affirmed.

MORSE & GRAVES
By DERELLE L. NORWOOD
Attorneys for Appellee

CERTIFICATE

The undersigned certifies that she has examined the provisions of Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and in her opinion the tendered brief conforms to all requirements.

DERELLE L. NORWOOD